

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

)	
DePuy Mitek, Inc.)	
a Massachusetts Corporation)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 04-12457 PBS
)	
Arthrex, Inc.)	
a Delaware Corporation)	
)	
Defendant.)	

**DEFENDANTS ARTHREX, INC.’S AND PEARSALLS, LTD.’S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, defendants Arthrex, Inc. (“Arthrex”) and Pearsalls Ltd. (“Pearsalls”) move this Court for an Order granting summary judgment and dismissing the patent infringement claim of plaintiff DePuy Mitek, Inc. in its entirety.

This case involves a claim for infringement of U.S. Patent No. 5, 314,446 (“the ‘446 patent”). There are two separate reasons why the undisputed facts demonstrate that there is no infringement. As explained in more detail in the accompanying memorandum and the concurrently-filed *Markman* claim interpretation brief, the term “PE” in the ‘446 patent should be construed to mean general purpose polyethylene, which does not include ultra high molecular weight polyethylene (“UHMWPE”). Since the accused products do not contain “PE” as that term should properly be construed, there is no infringement of the asserted claims of the ‘446 patent.

In addition, the accused product contains a coating, a material that is not identified in the asserted claims. Since the claims include the phrase “consisting essentially of,” there is no infringement if the accused products include a material not identified in the claim that affects the basic and novel characteristics of the claimed invention. Since the undisputed facts demonstrate that coating affects the basic and novel characteristics of the asserted claims of the ’446 patent, the inclusion of coating on the accused products precludes a finding of infringement.

Finally, in the alternative, should the Court construe the term “PE” to include “UHMWPE,” the asserted claims of the ’446 patent are invalid for anticipation because United States Patent No. 5,318,575 is prior art that discloses every limitation of the asserted claims of the ’446 patent.

The reason in support of this Motion are included in the accompanying Memorandum in Support of Defendants Arthrex, Inc.’s and Pearsalls Ltd.’s Motion for Summary Judgment and concurrently-filed *Markman* brief.

Dated: August 11, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendants Arthrex, Inc.'s and Pearsalls, Ltd.'s Motion for Summary Judgment, Memorandum in support thereof and Defendants Arthrex, Inc.'s and Pearsalls, Ltd.'s Concise Statement of Material Facts in Support of Their Motion for Summary Judgment was served, via the Court's email notification system on the following counsel for Plaintiff on the 11th day of August 2006:

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